

Sirisee (Migration) [2017] AATA 1938 (13 October 2017)

THE TRIBUNAL DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Phollawat Sirisee
CASE NUMBER:	1600929
DIBP REFERENCE(S):	BCC2015/2866138
MEMBER:	Mark Bishop
DATE:	13 October 2017
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal affirms the decision not to grant the applicant a Student (Temporary) Class TU) visa.

Statement made on 13 October 2017 at 3:57pm

CATCHWORDS

Migration – Student (Temporary) (Class TU) visa – Subclass 572 (Vocational Education and Training Sector) – Family unit (de facto) – Proof of relationship - Notification of decision – No response from applicant

LEGISLATION

Migration Act 1958, ss 5CB, 65, 359, 359C, 363A
Migration Regulations 1994, r 1.09A, Schedule 2, cl 572.322

CASES

Hasran v MIAC [2010] FCAFC 40

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 07 January 2016 to refuse to grant the visa applicant a Student (Temporary) (Class TU) Subclass 572 visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant applied on 30 September 2015 as a member of the family unit (de facto) of Lavanasakol Sirikanya.
3. At the time the visa application was lodged, the Student (Temporary) (Class TU) visa contained a number of subclasses. The relevant subclass in this case is Subclass 572.
4. The delegate in this case refused to grant the visa on the basis that the applicant did not meet the criteria set out in cl.572.322, which requires that the applicant is a member of the family unit of a person who meets certain criteria. The applicant applied for a review of the delegate's decision.
5. On 20 September 2017 the tribunal wrote to the applicant pursuant to s.359 (2) seeking further information. In particular the Tribunal sought "further evidence of your relationship". In the invitation the applicant was advised that, if the information was not provided in writing by 4 October 2017 the Tribunal may make a decision on the review without taking further steps to obtain the information and the applicant may lose any entitlement under the Act to appear before the Tribunal to give evidence and present arguments.
6. There was no response from the applicant. The applicant did not provide the requested information by the due date of 4 October 2017.
7. In these circumstances, s.359C applies and pursuant to s.360 (3) the review applicant is not entitled to appear before the Tribunal. The effect of s.363A of the Act is that is a review applicant has no entitlement to a hearing, the Tribunal has no power to permit him or her to appear: *Hasran v MIAC* [2010] FCAFC 40.
8. The Tribunal has decided to proceed to decision without taking further steps to obtain the information

CONSIDERATION OF CLAIMS AND EVIDENCE

9. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.
10. The issue before the Tribunal is whether the applicant meets the criteria set out in cl.572.322, which states:

[572.322] The applicant is a member of the family unit of a person (the **primary person**):

(a) who is the holder of a Subclass 560 or 562 visa and who meets one of the following:

(i) the primary person is a citizen of a gazetted country within the meaning of Part 560 as it read immediately before 1 July 2001;

(ii) the primary person is undertaking a course of study paid for, wholly or in part, by:

(A) the Commonwealth or the government of a State or Territory; or

(B) the government of a foreign country; or

(C) a multilateral agency;

- (iii) the primary person:
 - (A) will be, or has been, granted a visa in relation to a course of study that is, or to courses of study that are together, of a duration of 12 months or more; or
 - (B) has been lawfully in Australia for 12 months or more; or

(b) who satisfies, or has satisfied, the primary criteria in Subdivisions 572.21 and 572.22 and who meets one of the following:

- (i) the primary person is subject to assessment level 1 or 2;
- (ia) the primary person is an eligible vocational education and training student;
- (ii) the primary person is undertaking a course of study paid for, wholly or in part, by:
 - (A) the Commonwealth or the government of a State or Territory; or
 - (B) the government of a foreign country; or
 - (C) a multilateral agency;
- (iii) the primary person:
 - (A) will be, or has been, granted a visa in relation to a course of study that is, or to courses of study that are together, of a duration of 12 months or more; or
 - 11. (B) has been lawfully in Australia for 12 months or more

12. Relationship Status

13. According to the delegate's decision, the delegate wrote to the applicant on 07 October 2015 requesting further information /documentation to establish the nature of the relationship with Lavanasakol Sirikanya. The applicant provided the following information/documentation on 30 October 2015:

- Undated and unsigned statements (2) purporting to be from the applicant regarding his relationship with Lavanasakol Sirikanya. The applicant claimed to have been in a relationship with Lavanasakol Sirikanya for more than one year and said they share room with another Thai friend and didn't have indicators of shared financial obligations. Of significance the applicant advised there were no available indicators of a tenancy agreement, gas, water or phone bills.
- Undated and unsigned statement purporting to be from Lavanasakol Sirikanya regarding her relationship with the applicant. This statement was silent on all material aspects of the relationship. It failed to address any of the usual indicators of a bona fide de facto relationship – commencement date of relationship, period of living together, living arrangements, financial indicators of shared obligations and joint legal responsibilities. The statement failed to provide any of the above information and hence the Tribunal is unable to find they are in a genuine and continuing relationship and there is mutual commitment as required by the Regulations.
- Undated and unsigned signed statement purporting to be from Ms Wanvipa Nitichat who claims to be a sister of Lavanasakol Sirikanya regarding the applicant's relationship with Lavanasakol Sirikanya. This statement failed to provide any material information at all about the nature of the relationship between the applicant and Lavanasakol Sirikanya. It was of no assistance to the Tribunal as it tried to determine whether there was sufficient evidence of a de facto relationship.
- A set of bank statements showing firstly the opening of a joint bank account on 11 September 2015 and secondly the postal address for individual bank accounts in the

name of the applicant and Lavanasakol Sirikanya. Without exception this documentation showed transactions over a short time period of 2-5 months only.

- A letter from Bupa Australia, an authorised health care provider in Australia that confirmed the applicant had taken out 'Single status Overseas Student Health Cover' commencing on 22 November 2015. The tribunal notes this coverage is not for a couple or a family.
- A set of photographs of the applicant and Lavanasakol Sirikanya, mostly undated of social scenes with family and groups of friends. The photographs are evidence of a social relationship perhaps friendship, perhaps more. It is not possible for the Tribunal to conclude anything more definite.
- Copies of a boarding pass for a trip to Thailand in June 2015 which indicate the applicant and Lavanasakol Sirikanya travelled on the same flight. There was no evidence of the duration of the visit to Thailand or whether there was cohabitation together during the visit.

14. The Tribunal has had regard to s.5CB of the Act and Regulation 1.09A, when assessing whether the applicant is in a de facto relationship with Lavanasakol Sirikanya.
15. The Tribunal has considered all the evidence including the financial documentation the nature of the applicant's household and the nature of the commitment to each other based in part around a relationship certificate which identifies a domestic relationship between the applicant and Lavanasakol Sirikanya as at 24 December 2015.
16. Having regard to all of the circumstances of the relationship the Tribunal accepts the parties live in the same house, however it is not satisfied the parties are in a genuine and continuing relationship or there is a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied they are not related by family.
17. For these reasons the decision under review must be affirmed.
18. Furthermore, there is no evidence that the applicant meets the criteria for either a Subclass 576 (AusAID or Defence Sector) or Subclass 580 (Student Guardian) visa, the remaining subclasses of Class TU. The applicant is neither supported by the relevant Minister as required by cl.576.229, nor has made the visa application on the basis of being a Student guardian.

DECISION

19. The Tribunal affirms the decision not to grant the applicant a Student (Temporary) (Class TU) visa.

Mark Bishop
Member